

SURFACE TRANSPORTATION BOARD

Docket No. FD 32760 (Sub-No. 46)

BNSF RAILWAY COMPANY—TERMINAL TRACKAGE RIGHTS—KANSAS CITY
SOUTHERN RAILWAY COMPANY AND UNION PACIFIC RAILROAD COMPANY

Decision No. 5

Digest:¹ This decision amends the procedural schedule that governs this proceeding, initiates mediation, and sets a deadline for replies to a motion for protective order filed by Union Pacific Railroad Company.

Decided: May 15, 2018

By petition filed on January 12, 2018, BNSF Railway Company (BNSF) has requested that the Board establish conditions of use and compensation for BNSF to directly serve a LyondellBasell facility (Lyondell facility) at West Lake Charles, La., “over the Rosebluff Lead and related tracks via the terminal trackage rights granted by the Board” in BNSF Railway—Terminal Trackage Rights—Kansas City Southern Railway (Decision No. 3), FD 32760 (Sub-No. 46) (STB served July 5, 2016).

In a decision served May 1, 2018, and corrected on May 4, 2018, (Decision No. 4), the Board denied a motion filed by Kansas City Southern Railway Company (KCS) to dismiss this proceeding and issued a procedural schedule that: (1) ordered BNSF to supplement its petition by May 11, 2018, (2) provided 20 days for parties to reply to BNSF’s petition, as supplemented, and (3) provided BNSF 20 days to file its rebuttal argument. The Board also requested that the parties inform the Board if they were interested in participating in Board-sponsored mediation.

On May 4, 2018, Union Pacific Railroad Company (UP) filed a petition requesting that the Board reconsider Decision No. 4 and allow parties 45 days, rather than 20 days, to file reply arguments and evidence after BNSF supplements its petition. UP states that 20 days is not sufficient time to prepare and present reply evidence. UP further states that BNSF only recently produced some workpapers relating to BNSF’s operating plan and still has not produced all of its responsive documents relating to capacity on the lines and in the yards BNSF would use to serve the Lyondell facility. On May 7, 2018, BNSF filed a reply in opposition to UP’s petition, contesting, among other things, UP’s characterization of the progress of discovery. BNSF requests that the Board affirm the procedural schedule set forth in Decision No. 4.

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decision, EP 696 (STB served Sept. 2, 2010).

On May 9, 2018, KCS filed a letter notifying the Board of its willingness to participate in Board-sponsored mediation and requesting that the procedural schedule be tolled during the mediation period. KCS requests that, if either BNSF or UP is unwilling to participate in mediation, the Board allow KCS 45 days to complete discovery and reply to BNSF's supplemented petition. Also on May 9, 2018, UP filed a letter expressing its interest in participating in Board-sponsored mediation.

On May 10, 2018, BNSF filed a letter reiterating its request that the Board affirm the procedural schedule established in Decision No. 4. BNSF states that it does not object to Board-sponsored mediation but urges the Board not to toll the procedural schedule until after the parties have made their reply and rebuttal filings.

As discussed below, the Board will amend the procedural schedule to allow additional time for parties to reply to BNSF's supplemented petition and will initiate Board-sponsored mediation. The Board will not toll the procedural schedule at this time.

Board-Sponsored Mediation. In response to the Board's request, KCS, UP, and BNSF have indicated a willingness to participate in Board-sponsored mediation. Accordingly, the Board will initiate mediation to resolve any disputes regarding the conditions and compensation governing the trackage rights granted in Decision No. 3.

The Board will not hold the proceeding in abeyance at this time. When all parties consent to mediation, it is within the Board's discretion to hold a proceeding in abeyance while mediation procedures are pursued. 49 C.F.R. § 1109.3(e). Here, while BNSF does not object to participating in mediation, it requests that the Board not toll the procedural schedule at this time.

Within 10 days of the service date of this decision, the Chairman will appoint one or more mediators pursuant to 49 C.F.R. § 1109.3(a). Once appointed, the mediator or mediators will contact the parties to discuss ground rules and the time and location of any meetings. At least one principal of each party, who has authority to commit that party, shall participate in the mediation and be present at any session at which the mediator or mediators request(s) that the principal be present. The mediation period shall be 30 days, beginning on the date of the first mediation session. 49 C.F.R. § 1109.3(b). The parties may request to extend mediation by mutual written requests of all parties to the mediation proceeding. *Id.* The mediator or mediators are instructed to inform the Board when mediation has ended, with or without a resolution.

Extension of the Procedural Schedule. In light of the recent exchanges among the parties concerning discovery requests and production, as well as the upcoming mediation, the Board finds that there is good cause to provide additional time for replies to BNSF's supplemented petition.² See 49 C.F.R. § 1104.7. The procedural schedule will be amended to provide 45 days, until June 25, 2018, for parties to reply to BNSF's supplemented petition. BNSF's rebuttal evidence will be due on July 16, 2018.

² UP's petition for reconsideration is therefore moot.

UP's Motion for Protective Order. On May 14, 2018, UP filed a motion requesting that the Board issue a protective order under 49 C.F.R. § 1114.21(c)(1). UP seeks an order that it need not respond to discovery requests served by BNSF on May 11, 2018, with a response date of May 31, 2018. UP's motion will be addressed in a separate decision. In light of UP's request for expedited consideration, BNSF's reply to UP's motion will be due no later than May 17, 2018.

It is ordered:

1. The parties shall comply with the amended procedural schedule set forth in this decision.
2. Mediation will be initiated as discussed above.
3. BNSF's reply to UP's motion for a protective order is due no later than May 17, 2018.
4. This decision is effective on the date of service.

By the Board, Board Members Begeman and Miller.